



[Billing Code: 6110-01-P]

## **ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

### **Revised Model Rules for Implementation of the Equal Access to Justice Act**

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Notice of availability; Revised Model Rules for Implementation of the Equal Access to Justice Act.

**SUMMARY:** The Office of the Chairman of the Administrative Conference of the United States is issuing these *Revised Model Rules for Implementation of the Equal Access to Justice Act*.

These *Revised Model Rules* update the uniform procedures for the submission and consideration of applications for attorney fees under the Equal Access to Justice Act that were last issued in 1986. These *Revised Model Rules* reflect, among other things, amendments to the Act made by the Small Business Regulatory Enforcement Fairness Act and evolving adjudicative practices. They are designed to assist Federal agencies in adopting or modifying their own regulations for implementation of the Act.

**FOR FURTHER INFORMATION CONTACT:** Alexandria Tindall Webb, Attorney Advisor, Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

**SUPPLEMENTARY INFORMATION:** The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see [www.acus.gov](http://www.acus.gov).

The Equal Access to Justice Act (EAJA), first enacted in 1980, authorizes the award of attorney fees and other expenses to eligible parties who prevail against the Federal government in judicial proceedings and certain adversarial agency adjudicative proceedings, where the position of the government is not substantially justified.<sup>1</sup> In the case of certain adversarial agency adjudications, “[a]fter consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses.”<sup>2</sup> In furtherance of this statutory obligation, the Conference Chairman in 1981 issued a set of *Model Rules* for agencies to use when adopting rules for the consideration of applications for EAJA awards in agency adjudications.<sup>3</sup> The Conference Chairman issued a revised set of *Model Rules* in 1986.<sup>4</sup> Many agencies have since promulgated EAJA rules that are substantially based upon these *Model Rules*.<sup>5</sup>

The Office of the Chairman is issuing these *Revised Model Rules* to replace the 1981 and 1986 *Model Rules*. They include revisions made to reflect changes in law and in practice during the intervening thirty years and to promote greater accuracy and clarity. These rules were set forth in an appendix to Conference Recommendation 2019-4, *Revised Model Rules for*

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<sup>1</sup> 5 U.S.C. 504; 28 U.S.C. 2412.

<sup>2</sup> 5 U.S.C. 504(c)(1).

<sup>3</sup> Admin. Conf. of the U.S., Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

<sup>4</sup> Admin. Conf. of the U.S., Model Rules for Implementation of the Equal Access to Justice Act, 51 Fed. Reg. 16,659 (May 6, 1986) (previously codified at 1 C.F.R. pt. 315).

<sup>5</sup> See, e.g., Equal Access to Justice Act Implementation Rule, 79 Fed. Reg. 7,569 (Consumer Fin. Prot. Bureau Feb. 10, 2014) (codified as amended at 12 CFR pt. 1071); Equal Access to Justice Rules, 54 Fed. Reg. 53,050 (Sec. Exch. Comm’n Dec. 27, 1989) (codified as amended at 17 CFR pt. 200-01); Procedural Rules Implementing Equal Access to Justice Act, 51 Fed. Reg. 36,223 (Nat’l Labor Relations Bd. Oct. 9, 1986) (codified as amended at 29 CFR pt. 102); Procedural Rules; Miscellaneous Revisions and Corrections, 50 Fed. Reg. 53,302 (Fed. Trade Comm’n Dec. 31, 1985) (codified as amended at 16 CFR pt. 0-5).

*Implementation of the Equal Access to Justice Act*. Recommendation 2019-4 is published elsewhere in this issue of the *Federal Register*.

Unlike the 1981 and 1986 versions, these *Revised Model Rules* will not be published in the Code of Federal Regulations (CFR). The Federal Register Act requires codification of agency documents of general applicability and legal effect in the CFR.<sup>6</sup> However, these model rules are publishing in the Notices section of this issue of the *Federal Register* with the same intended effect of encouraging agencies to set out and implement these model rules as part of their own EAJA rules. Because these model rules are publishing in the Notices section, they will use a different numbering scheme than in past years. Agencies may use a different numbering system than what appears in the *Revised Model Rules*.

The most significant revision to the 1986 *Model Rules* is the elimination of much of the former Subpart A. This change was implemented because its provisions largely addressed substantive matters beyond the Conference's statutory charge. Some provisions of former Subpart A remain and were moved to other parts of the *Revised Model Rules* for the purpose of improved clarity. A new definitions section comprises Part 2 in the current revision. Additional changes were made to comport with the requirements of the Small Business Regulatory Enforcement Fairness Act, which was enacted in 1996.

The *Revised Model Rules* adopted by the Conference's Assembly as an Appendix to Recommendation 2019-4, and now issued by the Office of the Chairman, were initially drafted by a special ad hoc committee that held public meetings to address revision of the *Model Rules*. The materials related to the meetings, including the agendas, the 1981 and 1986 *Model Rules*, and draft versions of the *Revised Model Rules*, can be accessed via a dedicated webpage on the

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<sup>6</sup> 44 U.S.C. 1510

Conference's website at <https://www.acus.gov/research-projects/revised-model-rules-implementation-equal-access-justice-act>.

Agencies are encouraged to use these *Revised Model Rules* when drafting or revising their EAJA rules pertaining to adjudications in order to promote the uniformity of procedure contemplated by EAJA. The Office of the Chairman's expectations of how agencies can fulfill the statutory requirement of consultation with the ACUS Chairman are as follows. Agencies that publish proposed rules for comment should notify the Office of the Chairman of their publication by email to ACUS@info.gov, using "Model EAJA Rules Consultation" in the subject line. The Office of the Chairman will then provide any suggestions by reply email. Agencies that intend to publish final rules without a public comment period should send a draft to the Office of the Chairman for review and comment before publication if their rules depart significantly from these *Revised Model Rules*; the Office of the Chairman will expedite this review to the extent possible.

**Dated:** August 1, 2019

**Shawne C. McGibbon,**

*General Counsel.*

APPENDIX to Conference Recommendation 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*.

## **Part 1 — Scope of These Rules**

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### **Part 1 — Scope of These Rules**

#### **§ 1.01 Scope of these rules.**

The Equal Access to Justice Act, 5 U.S.C. 504 (called “EAJA” in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities that are parties to certain administrative proceedings (called “adversary adjudications”) before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency’s position was substantially justified or special circumstances make an award unjust. Alternatively, an

eligible party, even if not a prevailing party, may receive an award under 5 U.S.C. 504(a)(4) when it successfully defends against an excessive demand made by an agency.

## **Part 2 — Definitions**

### **§ 2.01 Definitions.**

For the purposes of these rules:

(a) *Adjudicative officer* means the official, whether the official is designated as an administrative law judge or otherwise, that presided over the hearing at the adversary adjudication or the official that presides over an EAJA proceeding.

(b) *Adversary adjudication* means (i) an adjudication under 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to 41 U.S.C. 7103 before an agency board of contract appeals as provided in 41 U.S.C. 7105, (iii) any hearing conducted under 31 U.S.C. 3801 *et seq.*, and (iv) the Religious Freedom Restoration Act of 1993.<sup>1</sup>

(c) *Demand* means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(d) *Excessive demand* means a demand by an agency, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory requirement, that is

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<sup>1</sup> The language that appears under subsection 315.201(b)(iv) was drawn directly from the Equal Access to Justice Act, 5 U.S.C. 504. The statute does not identify what adjudications involving the Religious Freedom Restoration Act of 1993 are covered.

substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case.

(e) *Final disposition* means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become final and unappealable, both within the agency and to the courts.

(f) *Party* means a party, as defined in 5 U.S.C. 551(3), that is (i) an individual whose net worth did not exceed \$2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act, may be a party regardless of the net worth of such organization or cooperative association. For purposes of 5 U.S.C. 504(a)(4), “party” also includes a small entity as defined in 5 U.S.C. 601.

(g) *Position of the agency* means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based, except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

### **Part 3 — EAJA Applications**

#### **§ 3.01 Application requirements.**

(a) A party seeking an award under EAJA shall file an application with the agency that conducted the adversarial adjudication within 30 days after the agency's final disposition of the adversary adjudication.

(b) The application shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency or agencies that the applicant alleges was not substantially justified; or, if the applicant has not prevailed, shall show that the agency's demand was substantially in excess of the decision of the adjudicative officer and was unreasonable when compared with that decision under the facts and circumstances of that case. The application shall also identify the agency position(s) in the proceeding that the applicant alleges was (were) not substantially justified or the agency's demand that is alleged to be excessive and unreasonable. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(c) The application shall also show that the applicant meets the definition of "party" in 5 U.S.C. 504(b)(1)(B), including adequate documentation of its net worth, as set forth in section 315.302.

(d) The application shall state the amount of fees and expenses for which an award is sought, subject to the requirements and limitations as set forth in 5 U.S.C. 504(b)(1)(A), with adequate documentation as set forth in section 315.303.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under penalty of perjury that the information provided in the application is true and correct.

**§ 3.02 Net worth exhibit.**

(a) Each applicant except a qualified tax-exempt organization, cooperative association, or, in the case of an application for an award related to an allegedly excessive demand by the agency, a small entity as that term is defined by 5 U.S.C. 601, shall provide with its application a detailed exhibit showing the net worth of the applicant is as represented in the statement required by section 315.301(c) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards provided in section 315.201(e). An adjudicative officer presiding over an EAJA proceeding may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may request that the documents be filed under seal or otherwise be treated as confidential, pursuant to [insert cross-reference to appropriate agency rules governing such requests].

### **§ 3.03 Documentation of fees and expenses.**

The application shall be accompanied by adequate documentation of the fees and other expenses incurred after initiation of the adversary adjudication, including, but not limited to, the reasonable cost of any study, analysis, engineering report, test, or project. With respect to a claim for fees and expenses involving an excessive demand by the agency, the application shall be accompanied by adequate documentation of such fees and expenses incurred after initiation of the adversary adjudication for which an award is sought attributable to the portion of the demand alleged to be excessive and unreasonable. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the

hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. An adjudicative officer presiding over an EAJA proceeding may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

#### **Part 4 — Procedures for Considering Applications**

##### **§ 4.01 Filing and service of documents.**

Any application for an award, or any accompanying documentation related to an application, shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except, as provided in section 315.302(b), for confidential financial information.

##### **§ 4.02 Answer to application.**

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer presiding over an EAJA proceeding upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied upon in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under section 315.405.

#### **§ 4.03 Reply.**

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under section 315.405.

#### **§ 4.04 Settlement.**

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying adversary adjudication, or after the adversary adjudication has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.

#### **§ 4.05 Further proceedings.**

(a) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer presiding over an EAJA proceeding may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold oral

argument; or allow for discovery or hold an evidentiary hearing, but only as to issues other than whether the agency's position was substantially justified (such as those involving the applicant's eligibility or substantiation of fees and expenses). Any written submissions shall be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(b) A request for further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

#### **§ 4.06 Decision.**

The adjudicative officer presiding over an EAJA proceeding shall issue an [initial or recommended]<sup>2</sup> decision on the application within [60 days] after the time for filing a reply, or when further proceedings are held, within [60 days] after completion of such proceedings.

(a) *For an application involving a prevailing party.* The decision on the application shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if applicable, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(b) *For an application involving an allegedly excessive agency demand.* The decision on the application shall include written findings and conclusions on the applicant's eligibility and an

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<sup>2</sup> Brackets such as these indicate that an agency is to use its discretion to determine what language or time frame is most appropriate.

explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the underlying decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That determination shall be based upon all the facts and circumstances of the case. The decision on the application shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

(c) *Awards.* An adjudicative officer presiding over an EAJA proceeding may reduce the amount to be awarded, or deny any award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

#### **§ 4.07 Agency review.**

Either the applicant or agency counsel may seek review of the decision of the adjudicative officer on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [insert cross-reference to agency's regular review procedures].

#### **§ 4.08 Judicial review.**

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

#### **§ 4.09 Stay of decision concerning award.**

Any proceedings on an application for fees under these rules shall be automatically stayed until the agency's final disposition of the decision on which the application is based and either the time period for seeking judicial review expires, or if review has been sought, until final disposition is made by a court and no further judicial review is available.

#### **§ 4.10 Payment of award.**

An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency's final decision granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within [60 days].

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